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BEFORE THE ARIZONA CORPORATIO

IN THE MATTER OF THE COMPLAINT OF
 THE BUREAU OF INDIAN AFFAIRS,
 UNITED STATES OF AMERICA, AGAINST
 MOHAVE ELECTRIC COOPERATIVE, INC.
 AS TO SERVICES TO THE HAVASUPAI
 AND HUALAPAI INDIAN RESERVATIONS.

) DOCKET NO.
) E-01750A-05-0579
)
) PROCEDURAL
) CONFERENCE
) ORAL ARGUMENT

At: Phoenix, Arizona

Date: April 3, 2009

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1 BE IT REMEMBERED that the above-entitled and
2 numbered matter came on regularly to be heard before the
3 Arizona Corporation Commission, in the Second Floor
4 Hearing Room of said Commission, 1200 West Washington
5 Street, Phoenix, Arizona, commencing at 1:31 p.m. on the
6 3rd day of April, 2009.

7
8 BEFORE: Ms. Teena Wolfe, Administrative Law Judge

9 APPEARANCES:

10 For the Bureau of Indian Affairs, United States of
11 America:

12 U.S. ATTORNEY'S OFFICE
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15 For Mohave Electric Cooperative, Inc.:

16 BRYAN CAVE, LLP
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JODY L. LENSCHOW, RMR, CRR
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1 ALJ WOLFE: Let's go on the record. Good
2 afternoon and welcome to the Arizona Corporation
3 Commission. This is the time and place set for oral
4 argument on BIA's motion to strike Mohave's submission of
5 supplemental affidavits and exhibits and portions of
6 Mohave's closing in the matter of the complaint of the
7 Bureau of Indian Affairs, United States of America,
8 against Mohave Electric Cooperative, Inc. as to services
9 to the Havasupai and Hualapai Indian Reservation,
10 Docket No. E-01750A-05-0579.

11 My name is Teena Wolfe, and I'm the
12 administrative law judge assigned to this proceeding; and
13 we'll take appearances, beginning with the complainant.

14 MR. WENKER: Mark Wenker for Complainant Bureau
15 of Indian Affairs.

16 MR. OTT: Rodney Ott with the law firm Bryan
17 Cave for Mohave Electric Cooperative.

18 ALJ WOLFE: Are there any procedural issues that
19 the parties want to discuss before we move to oral
20 argument?

21 MR. WENKER: I think we want to talk about
22 procedural issues after this, correct, Rodney, deadlines
23 and whatnot?

24 MR. OTT: Yes.

25 ALJ WOLFE: Okay. I just wanted to make sure

1 that you're prepared to go ahead with your oral argument.

2 Mr. Wenker, since it's your motion, please go
3 ahead.

4 MR. WENKER: Thank you, Your Honor.

5 I'll try to be brief. Mohave filed two
6 affidavits from the same witness, Tom Longtin, who was a
7 witness at the evidentiary hearing, and both of these were
8 filed I think a couple of days before Mohave filed their
9 initial written closing argument, probably -- I would have
10 to count, but around three months after the actual
11 evidentiary hearing.

12 The affidavits are troubling on a number of
13 fronts. First, with regard to the one affidavit, it deals
14 with something that apparently transpired on the Fort
15 Mohave Indian Reservation. I don't know if there was a
16 run-in or something along those lines. How that's
17 relevant to this case, which deals with the Havasupai and
18 the Hualapai Reservations, I don't know. The other thing
19 that's troubling with this particular affidavit is that
20 this supposed run-in with the Fort Mohave Indian officials
21 occurred on November 14th of 2008. That was -- actually,
22 I think that was when we were in the hearing.

23 Now, why did Mohave sit on this for three months
24 before they filed it? It gave the Bureau of Indian
25 Affairs no opportunity to address it or respond to it in

1 our initial closing argument.

2 These are troubling on another -- and I think
3 the rest of my argument deals with both affidavits, so
4 it's somewhat of a general argument. It's also troubling
5 on another front, in that there has to be some conclusion
6 to the evidence. Here we are probably four months after
7 the fact, after the evidentiary hearing, which everybody
8 got a full opportunity to present whatever witnesses they
9 wanted, whatever evidence they wanted, and now we're still
10 dealing with new evidence. There has to be some
11 conclusion, and I'll submit, Your Honor, it should have
12 been and it ought to be at the conclusion of the
13 evidentiary hearing, where Mohave had a full opportunity
14 to offer whatever evidence it desired.

15 And the mere fact that both of these deal --
16 well, the Fort Mohave apparently concerned something that
17 happened in the midst of trial; but clearly the other
18 affidavit dealing with a supposed run-in on the Hualapai
19 Reservation occurred several months after the evidentiary
20 hearing, or well after at least, and with regard to the
21 affidavit dealing with the Hualapai Reservation, it is
22 misleading to say the best.

23 Mohave did not have an easement to do what they
24 started to do, and what's ironic here, Your Honor, this
25 case obviously is dealing with a 70-mile line that crosses

1 the Hualapai Reservation and a portion of the Havasupai
2 Reservation. What's ironic is, Mohave got easements from
3 the BIA to build, operate and maintain that line. They
4 know the process of how they go about getting an easement
5 on tribal lands.

6 In this case, despite what Mr. Longtin's
7 affidavit says, they did not have an easement to erect a
8 new line. What they tried to do was build a new line
9 because two of the customers that were being served on
10 this 70-mile line are within their certificated area. The
11 light bulb finally went off in Mohave's mind, and they
12 realized they couldn't abandon those customers that they
13 did 11 years ago. They disconnected them.

14 So after the hearing Mohave went out and started
15 siting a line, started digging holes for poles, and they
16 were going to run a new line to serve -- I think it's one
17 line. Maybe it's a couple of lines. I don't know. But
18 they were going to run at least one new line to serve
19 these customers instead of having their hookups through
20 the 70-mile line.

21 They did get a letter from a member of the
22 Hualapai Tribal Council. However, just like with the
23 70-mile line, the easements they got there, that's
24 insufficient. They had to get a tribal resolution from
25 the Tribal Council and then submit that to the BIA, and

1 then the BIA is the one who grants Mohave the easement.

2 They never had that easement in their hand.

3 Maybe they have it today. I don't know. But when this
4 all came about, they did not have an easement from the
5 BIA.

6 This would be no different, Your Honor, than if
7 Mohave started running lines, digging holes in Bullhead
8 City. The City of Bullhead City would come on out and say
9 where's your easement; what entitles you to start digging
10 holes in our property or stringing up lines? And if
11 Mohave didn't have an easement, you better believe
12 Bullhead City would tell them you got to stop until you
13 get the easement.

14 That's exactly what happened here. They did not
15 have an easement. The Hualapai Tribe came on out. It was
16 not a threatening confrontation, as Mohave portrays it.
17 It was very civil. They asked for the easement. No
18 easement. They said you've got to stop and get it and
19 then you can do it. There were no threats whatsoever.

20 So the affidavits, at least -- I don't know
21 about Fort Mohave. I don't deal with them. It has
22 nothing to do with this case. But I know with regard to
23 the affidavit dealing with the Hualapai Reservation, it is
24 misleading; and because it's misleading, it's prejudicial
25 to the BIA. Not only because it's inaccurate, but how

1 this is coming about; Mohave files these affidavits and I
2 don't have an opportunity or the BIA doesn't have an
3 opportunity to cross-examine Mr. Longtin about what I
4 believe are serious factual misstatements.

5 Another thing the affidavits don't point out is
6 that when the tribe and the BIA saw that Mohave was
7 planning on running a new line, both of them made phone
8 calls to Mohave to inform them that you don't have an
9 easement and you need to get an easement; and Mohave did
10 not return any of those phone calls. They just went out
11 there and started digging holes.

12 This really looks like Mohave was trying to
13 create an incident to assist it or help its case with this
14 issue before the ACC, and the ACC should not condone what
15 may be an intentional provocation by Mohave.

16 Also, these affidavits, it's nothing but
17 hearsay. As far as I know, there's no exception to -- any
18 hearsay exception to any of these statements made in what
19 supposedly the tribes told the Mohave workers.

20 And I'll conclude. One other reason why this is
21 troubling, Your Honor, if you read between the lines, what
22 Mohave is trying to do here is, they're trying to imply
23 that dealing with the Native Americans is difficult,
24 they're untrustworthy and it's unsafe; and, again, the ACC
25 should not condone that. That's what Mohave's trying to

1 paint a picture here; that we can't serve Native Americans
2 because they can't be relied upon.

3 So for all those reasons and the reasons that
4 the BIA set forth in its motion, these two affidavits
5 ought to be stricken; and any reference that Mohave made
6 in its initial closing argument to these affidavits,
7 either by citation or by implication where they're talking
8 about things that are discussed in the affidavits, those
9 portions of Mohave's initial written closing argument
10 ought to be stricken, also, Your Honor.

11 ALJ WOLFE: Thank you.

12 Mr. Ott.

13 MR. OTT: Your Honor, first of all, we've
14 already responded on paper on this motion, so I would like
15 to rely on that.

16 But I do have to respond to some of the things
17 that Mr. Wenker said. First of all, there was never any
18 intentional provocation of any sort. Mohave's simply
19 trying to respond to an issue of serving its customers, as
20 the Commission certainly wants it to do.

21 There's also no intent to try to persuade the
22 Commission or somebody else to read between the lines
23 about any kind of, you know, defamatory statements about
24 Native Americans or working with Indian tribes. I mean
25 the facts are simply the facts here.

1 First of all, the affidavits are clearly
2 relevant. As Mr. Wenker acknowledges, one of the
3 affidavits deals with incidents that were arising as the
4 very hearing was taking place last November, and it took a
5 while to investigate those.

6 The second affidavit deals with incidents that
7 occurred on February 5th, long after the hearing. Now, I
8 would submit that the facts related in both affidavits are
9 clearly relevant to this matter. I mean the prime topic
10 of this complaint is -- one of the prime topics is the
11 issue of whether and how Mohave can serve on tribal lands,
12 on Indian Reservations and the various practical and legal
13 difficulties raised by that.

14 Both of those affidavits deal with those topics.
15 So they're clearly relevant. They occurred during and
16 after the hearing, so there was clearly no way they could
17 have been brought up at the hearing; and on the other
18 hand, because they were clearly relevant, Mohave felt a
19 need to communicate them to the Commission, and there
20 basically was no other way to do it other than
21 supplemental affidavits, which were filed on
22 February 18th, before the closing brief.

23 So, you know, the affidavits clearly involve
24 relevant matters. They clearly involve matters that
25 needed to be communicated to the Commission. I would

1 state, first of all, that -- well, Mr. Wenker seemed
2 concerned that there needs to be some close to the
3 evidence here. Well, this matter involves present day and
4 future provision of electrical service on tribal lands.
5 It does involve the past, but it also involves the present
6 and the future, and the Commission needs to take that into
7 consideration. Therefore, it seems to me pretty
8 unsurprising that present day and continuing events would
9 arise in these proceedings.

10 Mr. Wenker said that the BIA doesn't have an
11 opportunity to cross-examine Mr. Longtin. Well, we've
12 already agreed that the BIA can submit responsive
13 affidavits, and, if necessary, we could come up with some
14 procedure under which the hearings could be reopened, if
15 necessary. We don't believe that's necessary. But
16 clearly these are matters that the Commission should be
17 aware of, and Mr. Wenker can submit opposing affidavits to
18 deal with that.

19 He also raises some issues about -- evidentiary
20 issues about admissibility. I would just point out that,
21 first of all, this is an administrative proceeding, so the
22 rules of evidence are relaxed somewhat in that case.
23 Mr. Wenker can make any objections in his posthearing
24 briefing, as he objected to, for example, Mr. Moeller's
25 testimony. So any evidentiary issues or objections can be

1 raised in a posthearing briefing in any case to the extent
2 they're even applicable in these proceedings.

3 And just to -- Mr. Wenker also said that there
4 was never an easement in hand. Well, Your Honor only
5 needs to look at the materials we attached to the
6 affidavit. It certainly looks like an easement to my
7 untrained eye. It appears to be an easement signed by a
8 member of the Tribal Council, and if there are problems
9 determining whether the easement is effective and so on,
10 those are just inherent in dealing with operations on
11 tribal lands or on a Reservation. So that's another
12 matter that the Commission should be aware of, if there
13 are difficulties even determining whether your easement is
14 valid.

15 But, you know, to sum up, there was certainly no
16 intentional provocation by Mohave here and there's
17 certainly no intent to carry any subterranean meaning, you
18 know, between the lines. The affidavits simply say what
19 the affidavits say, and Mr. Wenker and his client have an
20 opportunity to respond. Thank you, Your Honor.

21 ALJ WOLFE: Mr. Wenker, do you have any
22 response?

23 MR. WENKER: I don't have any response other
24 than what's in our motion and what I've previously said.

25 ALJ WOLFE: Mr. Ott, I have to ask you if you

1 really believe that the only way to bring these issues to
2 the Commission's attention was via affidavits? Does
3 Mohave not believe that there is any other way to reopen
4 the evidentiary record in a proceeding other than filing
5 an affidavit?

6 MR. OTT: Well, I think that would be the
7 alternative to request a reopening of the proceedings. We
8 weren't sure that anybody else would want that, in fact.
9 I mean it may not be necessary. If the Commission
10 believes that it is necessary, certainly the Commission
11 has the power to do that.

12 ALJ WOLFE: Yes, the Commission does and the
13 Hearing Division does. I just wanted to -- I didn't want
14 to let that pass on the record that I would acquiesce in
15 that statement.

16 MR. OTT: Thank you, Your Honor.

17 ALJ WOLFE: Because I do not believe that this
18 was the only way that additional facts could be brought to
19 the attention of the Commission.

20 MR. OTT: If I could just say we believed that
21 was the most effective way and quick way to bring it to
22 the Commission's attention at the time.

23 ALJ WOLFE: Understood. They do raise some due
24 process concerns for the parties, the filing of these
25 affidavits, and there are several ways to deal with them.

1 Before I go into what those ways would be, I do agree this
2 is an administrative proceeding and the Administrative Law
3 Judges and the Commissioners are able to reserve judgment
4 on the relevance of all the evidence that's in the record
5 and to give all the evidence an appropriate weight.

6 With that said, I do believe that since these
7 have been filed, they can't be unfiled; and I believe that
8 the BIA should be given the opportunity to cross-examine
9 Mr. Longtin and, also, to bring on witnesses in rebuttal,
10 if the BIA wishes to do that.

11 I do understand and I take seriously the BIA's
12 claim that there does need to be an end to the evidence.
13 Both parties have points here, that there is evidence that
14 exists between the time the hearing ended and between the
15 time the Commission will render its final decision, so
16 it's not unusual, as Mohave says, for evidence to be
17 presented after a hearing. It's not the norm, but it does
18 happen.

19 So there have been some factual allegations
20 made, and I do believe that the BIA does deserve an
21 opportunity to rebut that, and I would like to give the
22 BIA the opportunity to decide how the BIA would best like
23 to do that, whether you want to call Mr. Longtin, whether
24 you want to call rebuttal witnesses or both or whether the
25 BIA would like to file its own affidavits in response to

1 back up with facts what you've said today.

2 MR. WENKER: Yeah, the predicament we have is,
3 to respond to some of the facts, we're going to have
4 difficulty either way, because I think if we respond by
5 affidavit or having somebody come down to respond to the
6 allegations, one, if not more, of those witnesses are not
7 BIA employees and we have no authority to have them come
8 down. It would be burdensome to them. So, if, as I
9 understand, the motion to strike is denied, we would
10 prefer to respond by affidavit.

11 ALJ WOLFE: I am going to deny the motion to
12 strike, for all the reasons that I just explained.

13 MR. WENKER: I'm sorry, in the same vein, we'll
14 respond to Mr. Longtin's affidavits by affidavit, so
15 essentially cross-examination. We don't need him to come
16 down.

17 ALJ WOLFE: And that would be acceptable to me.
18 It seems that that would be the most expeditious way to
19 deal with this, and I do take the arguments regarding
20 hearsay very seriously. We do admit hearsay evidence here
21 at the Commission, but we also do give it appropriate
22 weight. So I just want you to understand that; that I do
23 take that matter seriously in this case, because Mohave
24 could have called witnesses to present that evidence in a
25 way that wouldn't have been presenting hearsay evidence.

1 So, Mohave, do you have any objection to BIA
2 filing affidavits in response to Mr. Longtin's affidavits?

3 MR. OTT: No, we do not; and, in fact, we've
4 already discussed a potential schedule for that.

5 ALJ WOLFE: We can go off the record to discuss
6 the schedule.

7 (An off-the-record discussion ensued.)

8 ALJ WOLFE: All right, we'll go back on the
9 record then. We had a very brief off-the-record
10 discussion regarding the date for BIA to file its
11 affidavits in response to Mr. Longtin's affidavits, and
12 that date will be April 17th, and the parties agreed to
13 file their reply briefs by May 4th, 2009.

14 Are there any other procedural matters that the
15 parties wish to address today?

16 MR. WENKER: No, Your Honor.

17 MR. OTT: Not that I'm aware of.

18 ALJ WOLFE: Thank you very much for your
19 preparation and comments today.

20 MR. WENKER: Thank you.

21 MR. OTT: Thank you.

22 (The hearing concluded at 1:54 p.m.)

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1 STATE OF ARIZONA)
2) ss.
3 COUNTY OF MARICOPA)
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7 I, JODY L. LENSCHOW, RMR, CRR, Certified
8 Reporter No. 50192 for the State of Arizona, do hereby
9 certify that the foregoing printed pages constitute a
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12 and ability.

13 WITNESS my hand this 14th day of April, 2009.
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JODY L. LENSCHOW, RMR, CRR
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